U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 September 2006

CASE NO.: 2006-LHC-447

OWCP NO.: 07-168552

L.B.,
Claimant

v.

LAKE CHARLES FOOD PRODUCTS, L.L.C.,
Employer

and

THE AMERICAN LONGSHORE MUTUAL ASSOCIATION, LTD.,
Carrier

APPEARANCES:

Harry K. Burdette, Esq.,
On behalf of Claimant

Derek M. Mercer, Esq.,
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq*., (2000) brought by L.B. (Claimant), against Lake Charles Food Products, L.L.C., (Employer) and American Longshore Mutual Association Ltd. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was

referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on July 19, 2006 in Lafayette, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 15 exhibits which were admitted, including various DOL forms (LS-202, 203, 207, 208, 280, 18); Claimant request for discogram; wage records; deposition and medical records of Dr. Michel Heard; medical records of Dr. Mark McDonnell; MRI study by Dr. David Jewell; medical records of Laborde Diagnostics and Advanced Imaging. Employer called one witness, Dr. Walter S. Foster and introduced 25 exhibits various DOL forms (LS-202, 206, 207, 208); Employer accident report; wage records, indemnity and medical benefit payout sheets; petition for damages concerning May 29, 2004 motor vehicle accident; medical records of Drs. Heard, W. Stanley, Edward L. Soll, and Franklin Practice; deposition of Dr. Heard; Texas Medical Board and Texas Department of Insurance records pertaining to Dr. Mark F. McDonnell, Travis County Texas records of Dr. McDonnell v. Texas Workers Compensation Commission.[1]

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. On October 30, 2003 Claimant was injured in the course and scope of his employment as an employee of Employer.

2. On October 30, 2003, Employer was notified of the injury.

3. Employer filed Notices of Controversion on 4 separate dates (November 18, 2003; August 13, 2004; May 26, 2005; and June 20, 2005). (CX-3, EX-3, 5, 7).

4. Claimant's average weekly wage at time of injury was $634.96. (EX-10).

5. Employer paid temporary total disability benefits from October31, 2003 to May 26, 2005, (a period of 84 weeks) at $423.33 per week for a total of $29,176.10. (EX-9, 11). Employer also paid medical benefits until filing notice of controversion. (EX-12)

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.___; Claimant's exhibits- CX-___, p.___; Employer exhibits- EX-___, p.___; Administrative Law Judge exhibits- ALJX-___; p.___. Although Claimant listed 6 exhibits it supplied only 5 omitting CX-2. (Claimant's employment files with Employer).

II. ISSUES

The following unresolved issues were presented by the parties:

1. Causation: Whether Claimant's motor vehicle accident of May 29, 2004 constituted an independent, intervening cause so as to negate any further liability by Employer for payment of compensation and medical benefits to Claimant.

2. Interest and attorney's fees

III. STATEMENT OF THE CASE

A. Chronology:

On October 30, 2003, Claimant was injured at work when a fellow employee backed up a fork lift knocking Claimant to the ground and injuring his right hip, leg, elbow, and low back. (CX-1, 2; EX-1). Claimant was taken to an emergency room where he was examined, x-rayed, and released. On November 5, 2003, Dr. Heard examined Claimant and found moderate limitation of right and left lateral bending and extension of the lumbar spine, decreased motor and sensory exam, positive straight leg raising on the right, right elbow pain with last 30 degrees of flexion, spurring on the right and L3-4 and L4-5. Dr. Heard opined that Claimant had post-traumatic low back pain and recommended physical therapy and use of Ultracet, Vioxx, and Flexeril. (EX-14, pp 1, 2). Dr. Heard found Claimant unable to work pending treatment. On January 22, 2004 Claimant had a lumbar MRI showing a type II a protruding herniation of disc material at L5-S1. (EX-17).

Claimant made 36 follow-up visits to Dr. Heard on November 12, December 3, 17, 2003; January 7, 28, February 18, March 3, 24, April 14, 27, 28, June 1, 3, 4, 24, July 13, 14, August 16, September 17, 28, October 5, 26, November 22, December 22, 2004; January 24, February 14, March 22, April 25, May 25, June 15, July 19, August 9, October 24, December 1, 2005; January 23, and February 23, 2006. On these visits Claimant of moderate to severe low back, leg, and right elbow pain. The general impression as of April 14, 2004 was low back pain with right radiculitis and moderate L5-S1 for which Dr. Heard recommended lumbar epidural steroid injection (LESI) series. (EX-14, p. 13).[2]

The LESI series commenced on April 27, 2004. (EX-14, p. 15). On May 29, 2004, Claimant was involved in a motor vehicle accident when he was rear ended by a 1983 Chevy 6000. (EX-13). On May 30, 2004 Claimant was taken to the Emergency Room at Our Lady of Lourdes Hospital. When seen by Dr. Heard on June 1, 2004 Claimant had constant, severe low

[2] Nerve conduction studies of March 17, 2004 and September 14, 2005 were essentially normal. (EX-18, 19).

back and right leg pain with mild to moderate intermittent right elbow pain. (EX-14, p. 17). On June 3, 2004 Claimant had his second LESI and by June 24, 2004 the severe low back pain was intermittent producing a give away sensation. (Id. at 20). On July 13, 2004 Claimant had a third LESI. (Id. at 22). On subsequent visits, Claimant continued with constant and severe low back and leg pain and by February 14, 2005, developed moderate to severe intermittent headaches. (Id. at 33). On July 17, 2005 Claimant's left leg gave away causing him to fall but without apparent additional complications. (Id. at 38).

Concerning the May 29, 2004, MVA, Dr. Heard saw Claimant on 26 occasions; June 14, 21, July 12, August 2, 16, September 7, 28, October 5, 26, November 22, December 22, 2004; January 24, February 14, March 14, 22, April 25, May 25, June 15, July 6, 19, August 9, October 10, 24, December 1, 2005; January 11, and Feb 23, 2006 for aggravation of low back pain with right and left radiculitis, right elbow pain and headaches. (EX-15).

On October 21, 2005 and February 8, 2006, Claimant was evaluated by Dr. Mark F. McDonnell. On the first exam Dr. McDonnell performed what appeared to be a cursory examination concluding Dr. Heard should proceed with the LESI's which had already had been done and concluded the MVA did not substantially change his low back. On the second visit, Dr. McDonnell reviewed Claimant's past medical records, conducted a limited physical examination, and recommended a discogram from L3 to S1 to rule out sources of pain indicating Claimant was a candidate for either arthrodesis or disk replacement. (CX-20).

Claimant's attorney forwarded the request to Employer carrier's attorney who has declined payment citing records from Texas Medical Board and Texas Workers Compensation Commission, wherein Dr. McDonnell was removed from the list of physicians who could practice in the Texas Workers Compensation System due to allegations of substandard care and performing unnecessary surgeries, and further that the Texas State Board of Medical Examiners has filed a complaint against Dr. McDonnell for performing in essence unnecessary back surgeries. (EX-22-24). Claimant's counsel contends that all proceedings against Dr. McDonnell were dismissed in August, 2006. However, Employer notes that disciplinary proceedings were concluded with Dr. McDonnell agreeing not to resume his practice in Texas, nor to reapply for a Texas medical license once his current Texas license expired.

B. Claimant's Testimony

Claimant testified that on October 30, 2003 while transferring used chemicals from one container to another in a dockside warehouse he was knocked down by a forklift driver as the driver backed up. Claimant sustained injuries to his right arm and elbow, right hip, and lower back. (Tr. 28, 29). Lourdes Hospital provided initial treatment followed by orthopedic surgeon, Dr. Michel Heard who examined Claimant, ordered an MRI and restricted him from work. (Tr. 30). Dr. Heard arranged for Claimant to undergo lumbar epidural steroid injections (LESI). Claimant had his first LESI about a month prior to a May 30, 2004 motor vehicle accident resulting in considerable pain relief for 18 to 24 hours after which the pain returned. A day or two following the motor vehicle accident, Claimant had a second LESI. (Tr. 31, 32).

Claimant testified that the motor vehicle accident (MVA) aggravated his condition causing increased pain with additional injuries to his neck and left shoulder. The second LESI again provided some temporary relief. Claimant later had a third LESI about 3 weeks later in accord with Dr. Heard's initial treatment plans. (Tr. 33, 34). Following this procedure Claimant had a second MRI which was essentially similar to the pre-MVA MRI. (Tr. 35). Employer terminated weekly benefits May 27, 2005 and medical benefits June, 2006. Recently, Claimant received a prescription bill for over $2,000.00 which Employer refused to pay even though previously Employer had agreed to pay for some of charges. (Tr. 36).

Claimant testified that he has not been able to work since his work related October 30, 2003 accident and has not been released to return to work since that time by Dr. Heard. (Tr. 36) Currently Employer is refusing to pay for pain management, discograms, low back or lumbar surgery recommended by Dr. McDonnell. (Tr. 37-40).

On cross, Claimant admitted being rear-ended on May 29, 2004 by a vehicle going 60 miles per hour, and that as a result he sustained increased low back pain. (Tr. 42, 43). Further he had a second LESI on June 3, 2004 which reduced the pain from severe to moderate followed by a return to severe pain on June 24, 2004 and July 13, 2004. (Tr. 44). On December 26, 2005 Claimant admittedly fell on his right elbow which increased the pain in that elbow. Additionally, since the MVA Claimant has had more severe headaches. On redirect Claimant testified that the December 26, 2005 fall was due to leg pains which existed prior to the MVA. (Tr. 45, 46).

C. Testimony of Drs. Michel E. Heard and Walter S. Foster

Dr. Heard, a board-certified orthopedic surgeon, testified about his treatment of Claimant as noted above for a work related October 30, 2003 back injury and a subsequent May 29, 2004 MVA wherein he initially prescribed Ultracet, Vioxx, and Flexeril, and physical therapy, and recommended a lumbar MRI to evaluate severe and constant back pain and intermittent right elbow pain. (EX-20, pp. 3, 4). This was followed by LESI in between which Claimant had a MVA resulting in increased frequency and severity of low back pain plus onset of neck pain and headaches. (Id. at 5). Dr. Heard regarded the MVA as a subjective aggravation of the October 30, 2003 injury. (EX-20, pp. 5, 6).

In comparing lumbar MRI's taken before and after the MVA Dr. Heard found no objective evidence of aggravation. (Id. at 7). Nonetheless, Dr. Heard never released him to return to work restricting him to light and sedentary duties as tolerated. (Id. at 9). Dr. Heard recommended further evaluation by Drs. Stairs (pain management), and McDonald (spine surgery) finding Claimant not at MMI. (Id. at 10). On cross, Dr. Heard testified he did not know whether Claimant would have recovered follow the LESI, but that the MVA resulting in a significant subjective aggravation did not help Claimant's back condition. (Id. at 11).

Dr. Foster, a board-certified orthopedic surgeon, testified that he examined Claimant on December 30, 2003. During the exam Claimant gave a history of back injuries at work and in a MVA but allegedly all problems resolved with therapy. Dr. Foster recommended a lumbar MRI

which Dr. Foster read as a L5-S1 protrusion without substantial impingement and for which he recommended conservative treatment including LESI and a rehab program to strengthen the lumbar spine. (Tr. 49). Subsequently, Dr. Foster reviewed an EMG which he read as normal.

Dr. Foster opined that Claimant would be able to return to work following the LESI and rehab program which would take 3 months to complete. Dr. Foster saw Claimant a second time on October 27, 2004 during which visit Claimant told Dr. Foster about the MVA which increased his back and leg pain. Dr. Foster reviewed MRI's for September 8, 2004 and January 22, 2004 and found them essentially the same with no need for surgery. Dr. Foster also reviewed a February 15, 2005 lumbar myleogram and a post-myleogram CT which showed only a mild bulge at L5-S1 with no protrusion or herniation. (Tr. 50-52). Dr. Foster testified Claimant did not need a discogram because that was a preoperative test and Claimant did not need surgery. (Tr. 53). Rather Claimant needed physical therapy and a strengthening program. (Tr. 54). Further, by Claimant's own history he was getting better and then got worse when involved in a MVA which prohibited him from recovering as he had anticipated. (Tr. 55).

On cross, Dr. Foster admitted not doing any back surgery since 1995 due to cervical disc and hip replacement problems. In fact, Dr. Foster hasn't performed any surgery since 1995 due to loss of control and numbness in the left hand. Further he has no training as a radiologist. (Tr. 58). Further on December 30, 2003 he examined Claimant and found right sided paraspinal muscle spasm (an objective sign of injury) with a positive straight leg raising on the left at 60 degrees and at 20 degrees on the right. On the October 27, 2003 exam Dr. Foster again found positive bilateral straight leg raising and attributed it to central and left sided disc made worse by the MVA because Dr. Heard had recommended a work hardening program and FCE prior to the MVA, whereas in fact, Dr. Heard had not recommended work hardening until about 3 weeks after June 4, 2004. (Tr. 62-69). Further, it was not unusual for Claimant after the first LESI to claim relief only to have the symptoms gradually return. (Tr. 70). Also when comparing Claimant's two MRI's the second post MRA MRI doesn't show any worsening of the injury, but rather, shows reduced herniation. (Tr. 72). Dr. Foster also admitted it would be prudent to have a FCE and a job description before having Claimant return to work as he recommended yet he had neither and recommended Claimant could return to work. (Tr. 73, 74).[3]

IV. DISCUSSION

A. Contention of the Parties

Employer contends that the MVA of May 29, 2004 not only made Claimant's back condition worse it overpowered and nullified his previous work-related injury of October 30, 2003 such it constituted an independent, supervening or intervening cause removing it from

[3] Dr. Foster erroneously attributed all of Claimant's orthopedic problems to the MVA due to a misreading of Dr. Heard's records believing incorrectly that Dr. Heard had released Claimant to work hardening and an FCE prior to his MVA. (EX-16).

further liability to Claimant for either compensation or medical claims. Employer points to Claimant's and Dr. Heard's admissions about symptom aggravation following the MVA resulting in more severe and constant low back pain causing him to fall on one occasion and claims the Section 20(a) presumption has not been invoked and if invoked has been rebutted.

Employer argues that there are two different Fifth Circuit standards as to what constitutes a supervening cause citing the initial standard announced in ***Voris v. Texas Employers Ins. Assn.*** 190 F. 2d 929 (5th Cir. 1951) which held that a supervening cause was a force originating completely outside of employment that overpowered and nullified the initial injury and a second standard set forth in ***Mississippi Coast Marine v. Bosarge,*** 637 F. 2d 994, 1000 (5th Cir. 1981) which held that a simple "worsening" could result in a finding supervening cause. Employer contends that it met either standard because "certainly a motor vehicle traveling at 6o miles per hour and smashing into a vehicle driven by [Claimant] increasing pre-existing problems and causing new, severe injuries" met the ***Voris*** standard as well as the minimal worsening standard of ***Bosarge.***

Claimant argues that pre and post MVA MRI's of Claimant's lumbar area dated January 22, 2004 and September 8, 2004 are substantially the same even with discs appearing smaller on the later study with no objective evidence of aggravation. Claimant correctly acknowledges the differing 5th Circuit standards citing ***Shell Offshore, Inc., v. Gilliam,*** 122 F. 3d. 312 (5th Cir. 1997) and ***Bludworth Shipyard, Inc.,*** 700 F. 2d 1046 (5th Cir, 1983)(noting the tension between the standards) and ***Atlantic Marine, Inc., v. Bruce,*** 661 F. 2d 898 (1981) but contends Employer failed to prove either standard.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. ***Banks v. Chicago Grain Trimmers Association, Inc.,*** 390 U.S. 459, 467 (1968); ***Louisiana Insurance Guaranty Assn. v. Bunol,*** 211 F.3d 294, 297 (5th Cir. 2000); ***Hall v. Consolidated Employment Systems, Inc.***, 139 F.3d 1025, 1032 (5th Cir. 1998); ***Atlantic Marine, Inc., v. Bruce,*** 551 F.2d 898, 900 (5th Cir. 1981); ***Arnold v. Nabors Offshore Drilling, Inc.,*** 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. ***Banks,*** 390 U.S. at 467**;** ***Mijangos v. Avondale Shipyards, Inc.,*** 948 F.2d 941, 945 (5th Cir. 1991); ***Huff v. Mike Fink Restaurant, Benson's Inc.,*** 33 BRBS 179, 183 (1999).

In this case I was impressed by Claimant's demeanor and credibility. Claimant's testimony appears logical and consistent. On the other hand I was not impressed with Dr. Foster's testimony concerning the source of Claimant's current back condition which was impeached by Claimant's attorney as noted above. In like manner, I was not impressed by Dr. Mark McDonnell statements who did not know what Dr. Heard's treatment had been and who appeared from his notes to have engaged in a cursory examination of Claimant. I do not credit Dr. McDonnell's conclusion that Claimant is a surgical candidate because it is unsupported by

any other medical opinion or objective testing and appears too be the same type of recommendation for which he was disciplined in Texas.

C. Causation

Section 2(2) of the Act defines injury as an accidental injury or death arising out of or in the course of employment. 33 U.S.C. § 902(2)(2003). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary - -
> (a) That the claim comes within the provisions of this chapter

33 U.S.C. § 920(a) (2003).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated Cir. 2000); ***Kier v. Bethlehem Steel Corp.*,** 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. ***Hunter*,** 227 F.3d at 287. [T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. ***U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*,** 455 U.S. 608, 615, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also* ***Bludworth Shipyard Inc., v. Lira*,** 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); ***Devine v. Atlantic Container Lines*,** 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer and a *prima facie* case must be established before a claimant can take advantage of the presumption). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. ***Hunter***, 227 F.3d 287-88.

In order to show the first element of harm or injury a claimant must show that something has gone wrong with the human frame. ***Crawford v. Director, OWCP*,** 932 F.2d 152, 154 (2nd Cir. 1991); ***Wheatley v. Adler*,** 407 F.2d 307, 311-12 (D.C. Cir. 1968); ***Southern Stevedoring Corp., v. Henderson*,** 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. ***Adkins v. Safeway Stores, Inc.*,** 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. ***Gooden v. Director, OWCP*,** 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); ***Kubin v. Pro-Football, Inc.***, 29 BRBS 117, 119 (1995) (pre-existing back injuries).

In order to establish the second element, a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm. Rather a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a "mere fancy or wisp of what might have been. ***Wheatley v. Adler*****,** 407 F.2d 307, 313 (D.C. Cir. 1968). A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. ***Hampton v. Bethlehem Steel Corp.***, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); ***Golden v. Eler & Co.***, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980) (same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that conditions existed at work that could have caused the harm. ***Bonin v. Thames Valley Steel Corp.*****,** 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have cause his depression); ***Alley v. Julius Garfinckel & Co.*****,** 3 BRBS 212, 214-15 (1976) (finding the claimant's uncorroborated testimony on causation not worthy of belief); ***Smith v. Cooper Stevedoring Co.*****,** 17 BRBS 721, 727 (1985) (ALJ) (finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. Unlike occupational diseases, which require a harm particular to the employment, ***Leblanc v. Cooper/T. Stevedoring, Inc.***, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); ***Gencarelle v. General Dynamics Corp***., 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease), a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. ***Quinones v. H.B. Zachery, Inc.*****,** 32 BRBS 6, 7 (2000), *aff'd on other grounds*, 206 F.3d 474 (5th Cir. 2000). A claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

In this case there is no question that Claimant injured his back at work on October 30, 2003, thus invoking the Section 20 (a) presumption which Employer has not rebutted. The question which remains to be resolved is whether the May 29, 2004, MVA constituted an independent supervening cause so as to absolve Employer from liability. Contrary to Employer, I find that it did not nullify and overpower the first accident. Indeed pre and post MVA MRI's were substantially the same with Claimant still having disc herniation and severe symptoms. Employer thus did not meet the ***Voris*** standard. The question remains whether Employer met the ***Bosarge*** worsening standard.

The record clearly shows that following the MVA Claimant's aggravated his back symptoms and worsened his condition from a subjective standpoint. However, Claimant had and continues to experience severe pain from a herniated disc both pre and post MVA which back condition from an objective standpoint remained unchanged. Claimant continues to remain unable to work and in need of conservative medical treatment including LESI's not withstanding

the MVA. Applying the Act's liberal concept of causation, I find Employer liable even under ***Bosarge*** for continued treatment noting no change in conservative treatment following the MVA and no change in Claimant's back condition from an objective standpoint. ***Atlantic Marine, Inc., v. Bruce,*** 661 F. 2d 898 (5th Cir. 1981). Indeed in ***Atlantic,*** 661 F.2d at 901n.5 it appears that notwithstanding the simple worsening standard of ***Bosarge,*** the Court still looks to "overpowering and nullifying effects" as noted by the 7th Circuit in ***Jones v. Director, OWCP,*** 977 F. 2d 1106 (1992).

D. Medical Benefits

Section 7(a) of the Act provides that the employer shall furnish such medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require. 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. ***Dupre v. Cape Romaine Contractors, Inc.,*** 23 BRBS 86 (1989).

The presumptions of Section 20 apply in a determination of the necessity and the reasonableness of medical treatment. 33 U.S.C. § 920 (stating that "it shall be presumed in the absence of substantial evidence to the contrary - (a) That the claim comes within the provisions of this chapter; ***Amos v. Director, OWCP,*** 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999), *cert denied*, 528 U.S. 809 (1999)(finding a difference of opinion among physicians concerning treatment and deciding the issue based on the whole record); ***Turner v. Chesapeake & Potomac Tel. Co.,*** 16 BRBS 255, 257-58 (1984). *Cf.* ***Schoen v. United States Chamber of Commerce,*** 30 BRBS 112, 113-14 (1996)(finding that the Section 20(a) presumption did not apply in determining whether the charges incurred for self procured reasonable and necessary medical treatment were reasonable, and a claimant has the burden of proving the elements of the claim for medical benefits). Under the Administrative Procedures Act, however, a claimant has the ultimate burden of persuasion by a preponderance of the evidence. ***Greenwich Collieries***, 512 U.S. at 281. The Section 20 presumptions were left untouched by ***Greenwich Collieries***. *Id* at 280. Accordingly, once a claimant has established a *prima facie* case that medical treatment is reasonable and necessary, the employer must produce contrary evidence, and if that evidence is sufficiently substantial, the presumption dissolves and claimant is left with the ultimate burden of persuasion. ***American Grain Trimmers, Inc., v. Director, OWCP,*** 181 F.3d 810, 816-17 (7th Cir. 1999). Thus, the burden that shifts to the employer is the burden of production only. *Id*. at 817.

A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. ***Romeike v. Kaiser Shipyards,*** 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988). Once a claimant establishes a *prima facie* case, the employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. ***Salusky v. Army Air Force Exchange Service***, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). The Fifth Circuit uses a substantial evidence test in determining if an employer presented sufficient evidence to overcome a Section 20 presumption. *See* ***Conoco, Inc., v. Director, OWCP,*** 194

F.3d 684, 687-88 (5th Cir. 1999)(stating that [o]nce the presumption in Section [20] is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related (citing ***Bridier v. Alabama Dry Dock & Shipbuilding Corp.***, 29 BRBS 84 (1995)); ***Hampton v. Bethlehem Steel Corp.***, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The Fifth Circuit further elaborated on the substantial evidence test in the context of causation:

> [T]he employer [is] required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption-the kind of evidence a reasonable mind might accept as adequate to support a conclusion only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986)(emphasis in original). *See also*, ***Conoco, Inc.***, 194 F.3d at 690 (stating that the hurdle is far lower than a ruling out standard).

In this case Claimant introduced records from Dr. McDonnell seeking to perform a discogram and back surgery as well as referrals to Drs. Stairs and Mc Donnell by Dr. Heard for pain management and possible surgery due to their expertise in complex back cases thereby establishing the reasonableness or necessity of such referrals and procedures. Employer rebutted the *prima facie* case by reports from Dr. Foster questioning the need for either the discogram or surgery and by the introduction of disciplinary proceedings against Dr. McDonnell for the performance of unnecessary surgery.

Looking at the record as a whole I find insufficient evidence to warrant either a discogram or back surgery. Only Dr. McDonnell appears ready to operate prior to obtaining a discogram which is exactly what he was accused of doing in Texas, *i.e.*, performing surgery without sufficient objective evidence to warrant such. While the referral to Dr. Stairs for pain management appears reasonable, the referral to Dr. McDonnell does not appear to be either reasonable or necessary with the record devoid of credible evidence to indicate either a need for surgery or Dr. McDonnell's services.

E. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. ***Avallone v. Todd Shipyards Corp.***, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. ***Watkins v. Newport News Shipbuilding & Dry Dock Co.****, aff'd in pertinent part and rev'd on other grounds, sub nom.* ***Newport News v. Director, OWCP,*** 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §

1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills." ***Grant v. Portland Stevedoring Company, et al.,*** 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

F. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from October 30, 2003 to present and continuing based on an average weekly wage of $634.96 and a corresponding compensation rate of $423.31.

2. Employer shall be entitled to a credit for all compensation paid to Claimant after his October 30, 2003 injury.

3. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act including a referral to pain management by Dr. Stairs but excluding either a discogram or a referral to Dr. McDonnell for treatment.

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. § 1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
Administrative Law Judge